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ABSTRACT

This paper seeks to remind the reader that U.S. law is based on English cases and precedent far more than most persons realize. Specifically, a 1791 pronouncement by the U.S. Supreme Court that the English court system provides the model for the U.S. Supreme Court is offered as evidence of the paper's thesis. Examples of the sorts of English common laws that have been appropriated by U.S. courts are given, as well as examples of old English concepts that have been replaced in the U.S. by legislation. This paper may prove useful to secondary history or civics teachers and students interested in legal history. (DB)

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by

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ENGLISH LAW: AMERICAN COURTS

by David V. Stivison, Esq.

1991 is a year particularly rich in bicentennial observances. The first decision was handed down by the new United States Supreme Court on August 4, 1791. Our Federal Bill of Rights became effective on December 15, 1791. Celebrations are being planned around the 200th anniversary of both of these events.

On August 8, 1791, however, occurred a "bench ruling" by the U. S. Supreme Court's Chief Justice that was to have far-reaching effect on American law, a ruling probably unknown to all but a handful of American lawyers or judges. Here is the report:

"The Chief Justice, in answer to the motion of the Attorney General, made yesterday [August 7, 1791], informs him and the bar, **that this court consider the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.**" (1)

(Emphasis added) Because of this pronouncement, and similar policies in many state court systems, American law is based on English cases and precedent far more than most of us realize. Over three thousand American cases have cited pre-1867 English decisions and Magna Carta itself has been cited over seven hundred times in our courts.

Thus it is that old English law is often good modern American law. Now is the time to remind ourselves how that has happened and what it means to attorneys today.

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When the original colonies broke away from England and set up written Constitutions, they took over (or "received") the English law then in effect, to the extent it was consistent with our new government (2). After all, one major cause of the American Revolution was the denial of rights cherished by all English citizens: The infamous Stamp Acts not only levied taxes without representation, they denied a trial by jury for anyone charged under the Acts.

What was Rejected

The Declaration of Independence contains a long list of grievances against the King, many of them charging perversion of the legal system. The new states and their courts quickly rejected some of the most abused English practices out of hand. The English doctrine that all goods owned by a felon were forfeit to the King had become an inducement to false convictions to line the King's pockets. This doctrine of "deodands" was repudiated in America (3). Likewise, the separation of church and state in America left no place for the British "right of advowson," the right often held by large landowners to nominate the pastor for the parish church.

What has been Kept

As exemplified in the U. S. Supreme Court's August 8, 1791 pronouncement, English common law is good law in most American situations until it is replaced by a new statute or specifically overturned by a later court decision. How far back will our courts go? Look at this 1976 Ohio decision: Farmer Henry Long devised

equal shares of his farm to each of his three children "and the children of his body begotten, and their heirs and assigns forever."(4) The question was whether the heirs and assigns of one son who had died childless received anything. The state Supreme Court determined that this situation was directly controlled by the statute De Donis Conditionalibus ("Concerning Conditional Gifts"), adopted in England in 1285!

As this case illustrated, ancient laws as well as ancient cases can be applied today. The protection of state legislators from abusive federal grand jury investigations, for instance, is based on the English Bill of Rights of 1689 (5).

In deciding whether such ancient laws or precedents apply, courts first conduct "an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors" (6). This can lead to some unusual results. For instance, the question of whether complainants in a shareholders' derivative suit get a jury trial is answered by analyzing whether "If the company's rights being protected had been asserted in 1791, would it have been through an action at law before the King's Bench or a suit in equity in Chancery?" King's Bench relied on juries and Chancery did not. Try explaining to an angry shareholder why you are billing him thousands of dollars to research cases filed in the 1700's!

The second step courts take is to see if the precedent had ever been applied here in the colonies. If the precedent passes those two hurdles, the most difficult question remains: Should it be followed in American courts today?

Some concepts have simply outlived their usefulness. One of these is the doctrine that governmental units cannot be sued for injuries or death that they cause to individuals. This doctrine was enunciated in a 1788 English case (7) and was widely applied in America. The clear injustice of this rule has now convinced most American courts to eliminate it - but only after a careful analysis of its origin and effect and reasons justifying its abandonment (8).

What has been Superceded

Gradually many old English concepts are being replaced by legislation. This is particularly true in criminal law and landlord-tenant relations, for instance. This is what has happened to Magna Carta, first adopted by King John in 1215 after being forced on him by rebellious barons. Its provisions for trial by a jury of one's peers, freedom from excessive bail or unreasonable fines, speedy trial before unbiased judges, the right to travel freely in times of peace, and due process according to the law of the land, have been incorporated into provisions of our Federal and state Constitutions. Magna Carta is the spring and these Constitutions are the channels through which these rights flow to us. Magna Carta itself is not "good law" in America (9) because all its relevant protections have been included in the Constitutional provisions which supercede it. Even in England, all but four of Magna Carta's chapters have been superceded. The "English due process clause" found in Magna Carta, however, is one of those four remaining in force after nearly eight centuries.

When William and Mary were invited to take the throne of

England after the Glorious Revolution of 1688, they had to agree to accept thirteen declarations of the rights of English citizens, which became the British Bill of Rights, effective December 16, 1689. When the American Constitution was adopted in 1787, many felt that it, too, needed a Bill of Rights to protect many of the same interests. A list of fifteen articles was proposed by anti-Federalists in Pennsylvania on December 15, 1787 and became a sort of "discussion draft" throughout the states. Seventeen articles were proposed to the U. S. Senate by the House on August 24, 1789. A pared down list of twelve was approved by Congress and circulated to the states for adoption. The first two - on apportionment and compensation of Congress - were not adopted, but the remaining articles became our federal Bill of Rights on December 15, 1791. (10) Many of the provisions of these first ten Amendments flow directly from the British Act of 1689.

How Newer English concepts are Adopted

Even today American judges can be asked to adopt a recent English decision, not because it is binding on us, but because the reasoning is so persuasive. In many areas our laws are evolving in the same direction as England's, sometimes slower and sometimes faster.

The rule for the insanity defense announced by the House of Lords in 1843 has been widely accepted in America and forms at least the starting point for most judicial analyses of its application (11). The rule allowing recovery in certain cases of indirect, or "consequential", damages caused by another's

negligence was first announced in an 1854 English decision involving a bent shaft for a waterwheel (12).

Recent rulings from Britain or any of the former British Commonwealth countries will be carefully considered in areas where the development of a consistent international body of law is desirable. This is especially true for cases involving international business transactions, such as banking, finance, or maritime insurance.

Non-English Law

The Federal Constitution and forty-nine of the states use English common law as a basis. Louisiana uses the Napoleonic Code, but that is being gradually replaced by statutes. However, in certain circumstances, American courts look beyond English law, most commonly to Roman precedents. A recent case involving the diversion of stream waters by an electric utility to cool a nuclear generating plant, a true symbol of the most modern technology, was decided on Roman principles of water rights (13). In another case Roman law principles of "infamous crimes" were applied to prevent one of those convicted in the FBI's ABSCAM investigation from ever holding public office again (14).

Although, as the Chief Justice ruled in 1791, English practice affords the outline for us in America, it is the genius of American courts and judges to accept "the best ideas of all systems and of every age" (15) and to adapt them to the peculiar requirements of our time and place. It is a hard task, requiring careful historical research and a quick sympathy for the needs of

it for justice evenhandedly meted out.

Footnotes

1. 5 U.S. (1 Cranch) xvi. (1791).

2. E.g., "Such of the common and statutory law of England as had [before May 14, 1776] been in force in the province of Pennsylvania became the law of the Commonwealth." Comm. v. Ladd, 402 Pa. 164, 166 (1960).

3. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

4. Long v. Long, 45 Ohio St.2d 165, 343 N.E.2d 100 (1976).

5. In Re Grand Jury Proceedings, 563 F.2d 577 (3rd Cir. 1977); In Re Grand Jury Subpoena, 626 F.Supp. 1319 (D.C. M.D.Pa. 1986).

6. Twining v. New Jersey, 211 U.S. 78, 100 (1908).

7. Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788).

8. See, e.g., Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973) and Mayle v. Pa. Dept. of Highways, 479 Pa. 384, 388 A.2d 709 (1978) for good examples.

9. Adams v. American Bar Association, 400 F.Supp. 219 (D.C. E.D.Pa. 1975); Turner v. American Bar Association, 407 F.Supp. 451 (D.C. N.D.Tex. 1975).

10. The Declaration of Rights, 1689, Lois G. Schwoerer, c. 1981, pp. 296-297; Halsbury's Statutes of England and Wales, 4th Ed. (1985) 44-49; For the 15 articles of 1787, see Ratification of the Constitution by the States: Pennsylvania, Ed. M. Jensen, 1976, 597-599, 623-625; See How the Bill of Rights was Developed, D. V. Stivison, The Legal Intelligencer (Philadelphia), March 6, 8, 1990.

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11. M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718, (1843).

12. Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

13. Alburger v. Philadelphia Electric Co., 535 A.2d 729 (Pa. Comm. Ct. 1988).

14. Petition of Hughes, 532 A.2d 298, 304 (Pa. Sup. Ct. 1987).

15. Hurtado v. California, 110 U.S. 516, 531 (1884).